IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5354 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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ALLOCARE LABORATORIES

Versus

REGIONAL DIRECTOR

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Appearance:

1. Special Civil Application No. 5354 of 2002

SINGHI & CO for Petitioner No. 1

MR HEMANT S SHAH for Respondent No. 1

RULE SERVED BY DS for Respondent No. 2

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CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 13/08/2002

ORAL JUDGEMENT

1. Petitioner herein has challenged the validity of

showcause notices annexed to the petition at annexure-E & F and also a communication dated 1st May, 2002 annexed at annexure-G to the petition, which are issued by the office of respondent no.1 and has prayed that they be quashed and set-aside.

1.1. According to the petitioner it is a small scale industrial unit which started its operation sometime in the year 1989. Considering the limited production capacity of the petitioner it has always employed 7 to 9 persons since the time it started its operation. It has never employed 10 or more persons. It is the case of the petitioner that inspection was carried out by respondent no.2 under the provisions of Employees' State Insurance Act, 1948 (hereinafter referred to as "the Act") in May, 1994. Upon inquiry, the Inspector i.e. respondent no.2 found that not more than 7 persons were employed by the petitioner. Thereafter, similar inspection was done by respondent no.2 in the month of August, 1997. During that inspection respondent no.2 verified the records maintained by the petitioner and prepared a report in a tabular form indicating the strength of workers employed by the petitioner in each month in different years. This tabular statement shows the strength of persons employed by the petitioner from September, 1994 to August, 1997. According to the petitioner except for May, 1995, at no point of time the petitioner is stated to have engaged 10 or more persons in its establishment even as per the said tabular report. According to the petitioner, in the month of May, 1995 persons actually employed by the petitioner were only 9, but through mistake, a person who had visited the factory to see its working was taken to be an employee of the petitioner. It is the say of the petitioner that since its inception it has never employed 10 or more persons in its unit. The same, therefore, cannot be termed as "factory" within the meaning of Section 2 (12) of the Act. Inspite of that, respondent no.2 wrongly noted in his visit report dated 14th August, 1997 that 10 workers were working in the establishment of the petitioner in May, 1995. The petitioner's say is that subsequently it had tried to explain the correct position to the respondents, but without giving any opportunity of hearing to the petitioner it was concluded by the respondent that in May, 1995 the petitioner had employed 10 persons and, therefore, it was required to comply with the provisions of the Act since it was a "factory" within the meaning of Section 2 (12) of the Act. It is further the case of the petitioner that on 21st August, 2000 first show cause notice was issued. The same is annexed at annexure-C to the petition. Similar showcause notice was again given on 20th

February, 2002. It was issued by office of respondent no.2. It is annexed at annexure-E to the petition. The petitioner gave reply to these notices vide letter dated 8th March, 2002. On 1st April, 2002, the petitioner received a communication from the Deputy Director informing the petitioner that in May, 1995 it had engaged 10 employes and, therefore, it was a "factory" within the meaning of the Act and it should start complying with the provisions of the Act. These notices namely showcause notice dated 21st August, 2000 and notice dated 20th February, 2002 alongwith the aforesaid communication dated 1st May, 2000 are now challenged before me.

1.2. According to the respondents upon checking records during one of the visits by respondent no.2, petitioner was found to have engaged 10 employees in the month of May, 1995 and hence, it was a "factory" within the meaning of Section 2 (12) of the Act. It is the case of respondent that the petitioner was directed to comply with the provisions of the Act by serving notices dated 21st August, 2000 and 20th February, 2002. It was also called upon to make payment of the contribution for the wage period between May, 1995 to December, 2001 failing which it would be prosecuted under the Act. However, there is no compliance of these notices by the petitioner till this date.

1.3. Moreover, the say of the respondent is that when appropriate forum has been created under the Act, petition under Article 226 of the Constitution of India is not maintainable.

2. Mr.Chatrapati learned counsel for the petitioner has submitted before me that the petitioner is not a "factory" within the meaning of Section 2 (12) of the Act and it cannot be compelled to comply with provisions of the Act. He has further contended that the noting made by respondent no.2 with regard to 10 persons employed by the petitioner in the month of May, 1995 is factually not correct. According to him, even in that month 9 persons were employed but the Inspector without properly verifying the complete record, mistook him to be a person employed in the unit of the petitioner and made such noting. It was brought to his notice that the concerned person was not petitioner's employee but merely a visitor who had come to watch the manufacturing process and he had only signed the visitors register. The Inspector i.e. respondent no.2 was also informed that in the wage register etc., no mention with regard to payment of any wage to him was made. The noting made by respondent no.2 was, therefore, erroneous and subsequent steps regarding

issuance of showcause notices referred to above and the communication dated 1st May, 2002 have been taken totally under the misconception of law and misreading of the facts. He, therefore, submitted that these notices and communication are required to be quashed and set aside. He has further submitted that Section 45-A which is dealing with determination of contribution in certain cases requires personal hearing to be granted to the employer. However, no such hearing has been granted by the respondent before calling upon the petitioner to pay the contribution for the wage period between May, 1995 to December, 2001. According to him this amounts to non-compliance of the said provision as well as principles of natural justice and for that reason also the Court is required to quash and set-aside the aforesaid showcause notices. It is submitted by Mr.Chatrapati that the claim of respondents for payment of E.S.I. Contribution of the employee is for May, 1995, since on that day the petitioner is stated to have engaged 10 employees. Admittedly prior to that no dispute with regard to employment of 10 or more persons ever existed. So far as May, 1995 is concerned the recovery is sought to be made by issuing notice in the month of August, 2000 and thereafter by second notice dated 20th February, 2002. Both these notices are issued after the expiry of period of five years from May, 1995. He has submitted that it is a time barred claim according to proviso to explanation (b) of Section 77 (1A) of the Act.

2.1. As against that Mr.Hemant Shah learned counsel for the respondents has submitted that though the petitioner has been summoned to produce the relevant record, it has not done so. He has further submitted that considering the fact that in May, 1995, as per the noting of respondent no.2, 10 persons were employed by the petitioner, it clearly brings the petitioner within the meaning of "Factory" as defined in Section 2 (12) of the Act. He has further submitted that the Act continues to apply to the establishment/Unit even if the number of employees is subsequently reduced below 10 by virtue of Section 1 (6) of the Act. He has therefore, submitted that when there is application of Act, the petitioner is under statutory obligation to make payment towards E.S.I. Contribution and if it is not done, it has to face legal consequences. Of course the main contention of Mr.Shah is that the matter is only at the showcause notice stage and this Court sitting under Article 226 of the Constitution of India cannot exercise its writ jurisdiction to grant relief to the petitioner. This is more so, when equally efficacious remedy is available to

the petitioner under the Act.

3. I have carefully scrutinised the record of the petition as well as considered the submissions of both the learned counsels. It appears that the petitioner is is a small industrial unit having limited capacity of production and it usually employs persons numbering between 7 and 9. The report of respondent no.2 which covers period of almost four years shows that except in the month of May, 1995 at no point of time 10 or more persons have been employed by the petitioner. Even for May, 1995 the petitioner's say is that the actual number of persons employed on the relevant date was only 9. However, there was a visitor who had come to observe the working of the petitioner unit and as per the practice of the petitioner, he had merely signed the visitors register. No salary or wage has been paid to him, nor his presence in any other record has been noted. Considering the facts that have been placed on record it appears that the say of the petitioner is correct. It is not in dispute that the noting was made by respondent no.2 during his visit in the month of August, 1997. At that time a report had been prepared from which it clearly appears that the Inspector had no chance to verify the wage register from 16th September, 1994 onwards and the ledger of the cash book from 16th September, 1994 onwards. Without verifying these records, which were very relevant for the purpose of determining whether the concerned person was employee or merely a visitor, the Inspector should not have made the disputed entry for May, 1995 more particularly, when he was told that the said person had inadvertently signed only in the register verified by respondent no.2 and at that very moment he was apprised of the correct position. The report shows on what basis the said entry has been made. However, when he was made aware of the correct position he ought to have perused other record also. Without verifying other records he should not have made such noting in his report. This noting has been made by the Inspector during his visit to petitioner's Unit way back on 14th August, 1997. It appears that subsequently till August, 2000 two more visits have been made to petitioner's establishment. During those visits also he does not seem to have made any effort to verify other relevant record such as wage register, ledger book etc. to find out correct position of the number of workers employed by the petitioner on that particular day. Respondent no.2, except for insisting upon compliance under provisions of the Act & threatening the petitioner with prosecution does not seem to have made any effort to find out the truth.

3.1. Normally such fact finding exercise should not be done by this Court, but when it touches the very issue regarding applicability of the Act this Court can certainly do it, more so when the record of the petition adequately enables the Court to decide this issue. In other words to ascertain the rights flowing in favour of the petitioner from the facts the High Court under Article 226 can appreciate the facts and draw conclusions based on them. Further, when it becomes explicit from the record that due to arbitrary action injustice is being caused, the High Court may remove all the statutory or self imposed restrictions and exercise power to render justice without being influenced by technicalities to the aggrieved party. This is the view taken by the Apex Court in the case of Union of India & Ors. v. Reddappa & Anr. reported in 1993 (4) S.C.C. 269.

3.2. It can also be seen from the record of the petition that the petitioner has made endeavour to convince the respondent by writing several letters that the number of persons employed by it had never been 10 or more and the entry regarding May, 1995 was made inspite of the fact that in the account books and the wage register of the petitioner, no entry with regard to payment made to such person had been made. The petitioner also craved for personal hearing but it seems that neither the petitioner's version has been accepted nor any opportunity of hearing has been afforded to it. In the background of the aforesaid circumstances, it can safely be held that the petitioner cannot be brought within the purview of Section 2 (12) of the Act merely on the ground that in May 1995, 10 persons were employed by it. If that be so, the Act will not apply to it and all the steps initiated by the respondent under the Act will be of no consequence at all.

4. So far as Mr.Chatrapati's contention regarding noncompliance of principles of natural justice as well as of mandatory provision of affording opportunity of hearing as envisaged under Section 45A of the Act is concerned, it appears from the record that there is complete violation thereof. Section 45A of the Act deals with the determination of contribution in certain cases. It reads as under :-

"45A. Determination of contributions in certain cases :-

(1) Where in respect of a factory or establishment no returns, particulars,

registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any Inspector or other official of the Corporation referred to in sub-section (2) of section 45 is [prevented in any manner] by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under Section 45, the Corporation may, on he basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment :

[Provided that no such order shall be passed by the Corporation unless the principal or immediate employer of the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.]

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under Section 75 or for recovery of the amount determined by such order as an error or land revenue under Section 45B [or the recovery under Section 45C to section 45-1].

4.1. Proviso to sub-section (1) of Section 45A requires that Corporation cannot pass such order unless the principal or immediate employer of the person in charge of the factory or establishment has been afforded a reasonable opportunity of hearing. The record of the petition shows that the petitioner had, within short time of the aforesaid visit of respondent no.2, made efforts to seek opportunity of hearing and to explain to the respondents the correct situation. However, no such opportunity seems to have been given. It appears from the affidavit-in-reply filed by the respondents and particularly contents of paragraph 5 thereof, that for the first time the petitioner was called upon to submit forms and factual data vide notice dated 21st August, 2000. Though in the correspondence produced by petitioner there is some reference of notice but it is not on record and contents are not known except that it intended to prosecute the petitioner. At this juncture it may be noted that at the time of his visit on 14th August, 1997, respondent no.2 had verified only general

attendance register. This fact is mentioned in the endorsement which is made below the visit Report prepared by respondent no.2. On the day of visit respondent no.2 also appears to have prepared a separate note wherein it is mentioned that he had verified only attendance register and wage-register and ledger/cash-book for the petition 16th September, 1994 were not produced as they were not readily available then. The said note also mentions that petitioner had agreed to produce them on next visit/inspection by respondent no.2. No material is there on record to show whether during such subsequent visits, inspection of those register was made by respondent no.2. The only course then open for the petitioner was to seek opportunity of hearing and explain the things by producing relevant record, to the respondents. However, even in the first notice, dated 21st August, 2000 the request made by the petitioner since long does not seem to have been acceded to. Thus there is nothing to show that the petitioner was ever afforded the opportunity of hearing as required under the provisions of Section 45A of the Act. It may further be noted that all throughout, the petitioner had been clamoring for opportunity of hearing with a view to show to the respondents that its establishment is not covered under Section 2 (12) of the Act and, therefore, the Act does not apply to it. If the notice is perused it calls upon the petitioner to make payment of the contribution for the wage period from May, 1995 to December, 2001 as required under Regulation 31 of the Employees' State Insurance (General) Regulations, 1950 and the notice is also passed on the footing that the Act applies to the petitioner. This notice, therefore, cannot be said to be an intimation to the petitioner giving him an opportunity of hearing. In para 7 of Affidavit-in-reply it has been stated that in 1997-98 respondent no.2 had intimated petitioner to comply with the provisions of the Act. In para 8 of Affidavit-in-reply it has also been stated that decision under Section 45A of the Act is taken after granting full opportunity to the petitioner. One fails to understand on what basis such statement is made on oath by the deponent. No documents have been annexed to affidavit-in-reply by the respondents whereby one can safely conclude that specific opportunity of hearing had been granted to the petitioner. Impugned show cause notices can never be considered as intimation or opportunity of granting personal hearing. Both these notices envisage payment of contribution and strict compliance failing which prosecution. Thus irrespective of the provision of section 45A and in particular the proviso to sub-section (1) the opportunity of hearing that was sought by the petitioner has not been given to

it. Thus, there is flagrant violation of principles of natural justice also besides the breach of Section 45A of the Act.

5. The second aspect of this issue is that during the course of five years the respondents have not afforded any opportunity of hearing to the petitioner. Though from the record it appears that on several occasions such request was made by the petitioner. Had the respondents acted in time, probably the petitioner would have been in a better position to explain successfully to the respondents that even in May, 1995 there were not 10 employees but lesser number of employees were employed by it. However, after a lapse of such a long period one is likely to lose the relevant evidence and even memories would start fading by that time and no accurate picture can be had. This would amount to depriving the petitioner of fair chance to defend its interest and that would also result into violation of principles of natural justice.

6. If in the background of this factual data the controversy with regard to limitation is examined, it will show that first showcause notice was issued to the petitioner on 21st August, 2000. It is after a lapse of 5 years and 3 months of May, 1995 and 3 years after the visit of respondent no.2 to petitioner's Unit in August, 1997. No explanation whatsoever has been furnished by the respondent why it took so long for them to issue first showcause notice. Even the affidavit-in-reply is completely silent on that aspect. Here it may be worthwhile to refer to the provisions of Section 77 sub-section 1-A clause-(b) of the Act. The same reads as under :-

Section 77 (1) x x x x x x.

(1A) Every such application shall be made within a period of three years from the date on which the cause of action arose.

Explanation :- For the purpose of this sub-section :

(a) x x x x x x x x x .

(b) the cause of action in respect of a claim by the Corporation for recovering contributions (including interest and damages) from the principal employer shall be deemed to have arisen on the

date on which such claim is made by the Corporation for the first time :

Provided that no claim shall be made by the Corporation after five years of the period to which the claim relates.

6.1. The aforesaid provisions clearly show that no claim shall be made by the Corporation after five years of the period to which the claim relates. Assuming that in May, 1995, 10 persons were employed by the petitioner even then for that period the claim of respondent is time barred. By virtue of the aforesaid provision the respondent is required to take all appropriate action under the Act to recover that amount in relation to May, 1995 within a period of five years from that date. As the record shows that even first showcause notice which has been given to the petitioner for that period is dated 21st August, 2000 i.e. after a lapse of five years and three months. No claim therefore can be treated as permissible which is made after five years from the relevant period.

6.2. Mr.Shah has placed reliance on the decision of the Bombay High Court rendered in an Appeal under Employees' State Insurance Act No.1/1996 dated 28th August, 1996. According to Mr.Shah limitation as provided under Section 77 does not apply to Corporation but only applies to the employer vis-a-vis Section 45-A of the Act. Considering the clear language of explanation (b) and its proviso of Section 77(1A) this submission of Mr.Shah cannot be accepted. The Corporation is specifically prohibited from making any claim after the expiry of five years of the period to which the claim relates by virtue of proviso to explanation (b). When it is so, the Corporation cannot take any step to make claim for May, 1995 after lapse of five years. As can be seen from the record, notice of Corporation is in August, 200 which is beyond the period of five years and petitioner cannot therefore, be expected to respond to it.

7. The last question that remains for consideration is whether this Court at the showcause notice stage can interfere under Article 226 of the Constitution of India. Mr.Hemant Shah learned counsel for the respondent has placed reliance on the judgment of the learned Single Judge of this Court rendered in the case of Jyotiben C. Shinde v. State of Gujarat reported in 1998 (3) G.L.R. at page 1989. It is a case under the provisions of

Gujarat Municipalities Act, 1963. It has been held in that case that when the State Government had a right to issue showcause notice the concerned municipality was required to answer it and that writ petition under Article 226 could not lie against the showcause notice. This judgment cannot help the respondents because it has been observed in that case that the State has a right to issue showcause notice under the Gujarat Municipalities Act. There is no doubt that even under present Act the respondent has the authority to issue showcause notice. But when it is found that the impugned notices have been issued after the prescribed period of limitation it can be said that by then no valid right existed in favour of the respondent to issue such notices and this virtually deprived the respondents of their jurisdiction at least for this purpose. Mr.Shah has also placed reliance on the judgment rendered by the Division Bench of this Court in Special Civil Application no.4524/1988. If carefully perused it is merely an order of the Division Bench which is passed on the concession made by the learned counsel for the petitioner. No specific law has been laid down by the Division Bench with regard to alternative remedy. This order therefore, cannot be considered for deciding the issue regarding alternative remedy. It is time and again said by the Apex Court that when there is inherent infirmity in the impugned action or there is gross violation of principles of natural justice, petition under Article 226 of the Constitution of India can be entertained by the High Court. On both these counts my findings are in favour of the petitioner. It is, therefore, desirable that grievances of the petitioner should be remedied in this petition. Moreover when there is no material to hold that petitioner's Unit is a "factory" within the meaning of Section 2 (12) of the Act, it cannot be directed to approach the forum created under the Act. In other words when the Act does not apply, the petitioner cannot be relegated to pursue the remedy provided under the Act, before the Employees' Insurance Court.

7.1. In State of Himachal Pradesh v. Raja Mahendra Pal reported in A.I.R. 1999 S.C. 1786 the Apex Court has laid down that when authorities act without jurisdiction, alternative remedy is no bar. Similarly in case of Whirlpool Corporation v. Registrar of Trade Marks reported in 1998 (8) S.C.C 1 the Apex Court has clearly laid down that when there is violation of principles of natural justice alternative remedy cannot operate as a bar.

8. As already discussed above, no opportunity of

hearing has been ever afforded to the petitioner despite its repeated request. Therefore, there is violation of provisions of Section 45A of the Act. When such mandatory provisions have not been complied with, the action taken by the respondents cannot be sustained.

9. In light of the aforesaid discussion, this petition is required to be allowed. The same is therefore hereby allowed. Showcause notices at annexure-E & F and communication dated 1st May, 2002 at annexure-G to the petition are quashed and set-aside. Rule is made absolute with no order as to costs.

[AKSHAY H. MEHTA, J.]

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